IN THE

Supreme Court of the United States

October Term, 1975

No. 75-614

HAPAG-LLOYD, A.G., as owner of the M/V BRANDENBURG, and as bailee of cargo laden thereon, and STORK AMSTERDAM N.V., *et al.*, as owners of certain cargoes laden thereon,

Petitioners,

—against—

TEXACO PANAMA, INC., as owner of the M/V TEXACO CARIBBEAN,

Respondent.

BRANDENBURG PETITIONERS' REPLY BRIEF

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This Petition asks this Court to resolve two very important questions of federal law. Respondent Texaco's answer is to deny that the questions exist. Texaco's denial is in all respect specious.

Thus, Texaco wrongly asserts that:

1. The English law and the United States law are the same.

2. The law of the Second Circuit and the law of the Sixth Circuit are the same.

3. Anyway, English law would be applied to this case.

Review of the cases shows the error of all three assertions.

Chronological review of the few pertinent cases shows the error of Texaco's first two assertions.

1882. England's Court of Appeal in *The Douglas,* [1882] 7 P.D. 151, decides that an owner of a dangerous sunken wreck can relieve himself of the duty to light and mark it by simply giving notice to local authority. The sunken Douglas' mate sent a notice to the Harbour-master, with a request that he take care of the wreck; a message was returned to the Mate that the Harbour-master would undertake to light it. Before this was done, another vessel struck the dangerous wreck and sank. The Douglas' owners are exonerated, despite their failure to take any independent action to protect shipping.

Lord Coleridge, C.J. states:

> "It must be inferred upon these facts that he [the Harbour-master] undertook to do the duty, and at least the mate of *The Douglas* had fair ground for supposing he would perform it." [1882] 7 P.D. at 158.

And Cotton, L. J.:

> "This circumstance exonerates the defendants from the charge of negligence, *for it gave the harbour-master notice to perform the duty.*" [1882] 7 P.D. at 158. (*emphasis added*).

1893. In *The Utopia,* [1893] A.C. 492, England's Privy Council [House of Lords] specifically reviews and approves the holding of *The Douglas* " . . . that, inasmuch as notice was given to the harbour-master, the defendants were not guilty of negligence". [1893] A.C. at 497.

1915. The Second Circuit in *The Plymouth,* 225 F. 483, considers the question of a wreck owner's duty for the first time. Finding no American authority on the subject, the Second Circuit quotes *The Douglas* with approval and states as a general rule that "No wiser or safer course

could be taken than to rely upon the resources and competency of the Lighthouse Department [the governmental authority then in charge of wreck operations] . . ." 225 F. at 484.

1927. The Second Circuit cites with approvel *The Plymouth* and its adoption of the English rule that the wreck owner ". . . would have been absolved . . ." if he simply ". . . told [The Lighthouse Department] to proceed . . .". *Red Star Towing & Transportation Co.* v. *Woodburn,* 18 F. 2d 77, 79.

1947. The Second Circuit once more cites with approval the English rule adopted by the Second Circuit in *The Plymouth,* stating ". . . that notification of the Coast Guard was equivalent to a request that they mark the wreck; such a request would probably have been sufficient to discharge [the wreck owner's] duty to mark. See *The Plymouth,* 2 Cir., 225 F. 483." *Petition of Anthony O'Boyle, Inc.,* 161 F. 2d 966, 967.

1951. In *Berwind-White Coal Mining Co.* v. *Pitney,* 187 F. 2d 665, the Second Circuit dramatically and expressly rejects its own previous approval of the English rule of *The Douglas.* The Second Circuit adopts a new and enlightened rule, expressly contrary to the old English rule. The new United States rule requires the owner of a hazardous wreck to make all reasonable efforts to locate and mark it, even after Governmental Authority has accepted responsibility:

> "Nor do the unsuccessful efforts of the Coast Guard to locate and mark the wreck affect this liability. * * * *The mere fact that the Coast Guard undertakes a search does not relieve the owner of liability for failure to make all reasonable efforts to mark.* The Snug Harbor, 4 Cir., 40 F. 2d 27. *The dicta in Petition of Anthony O'Boyle, Inc., . . . and Red Star Towing & Transportation Co.* v. *Woodburn . . . which may indicate the contrary should be discounted accordingly.*" 187 F.2d at 669. (*emphasis added*).

1962. In *Morania Barge No. 140, Inc.* v. *M. & J. Tracy, Inc.*, 312 F. 2d 78, the Second Circuit reaffirms its rejection of the old English rule. Citing *Berwind* in support of the new United States rule, it *holds* that a mere request to ". . . the Coast Guard to patrol or mark [a] sunken [wreck] . . . would not discharge [the wreck owner's] non-delegable, statutory[1] duty to mark the wreck," 312 F.2d, at 83.

1973. Senior Second Circuit Justice Leonard P. Moore (sitting by designation in the Eastern District of New York) holds, following careful analysis of *Berwind* and *Morania*, that a wreck owner's duty to mark his dangerous hulk does not cease until ". . . the Coast Guard has actually marked the wreck with its own buoy", *even though* the Coast Guard had in fact temporarily hung both a flag and a lantern on the mast of the wrecked vessel, *and* the wreck owner had left the area ". . . with the knowledge that a Coast Guard buoy tender was due to arrive at any moment to place a large wreck buoy . . ." *Marine Towing* v. *Red Star T. & T. Co.*, 1974 A.M.C. 691, 694.

1974. The Sixth Circuit examines the early Second Circuit rule, which had followed the English rule permitting

[1] *Morania*, as most other U.S. wreck cases, naturally arose in U.S. territorial navigable waters and accordingly came under the terms of *The Wreck Statute*, 33 U.S.C. §409. This *non*-issue is much discussed by Texaco at pp. 19-20 of its Opposing Brief. But whether or not the statute applies in a particular case is irrelevant, since the statute is no more than a statutory declaration of pre-existing General Maritime Law.

> The Wreck Statute is ". . . but declaratory of the general maritime law • • • and without any statute the law lays this obligation upon every owner who does not abandon a wrecked vessel." *The William Nelson*, 296 F. 553, 556 (E.D.N.Y. 1923).
>
> The Wreck Statute ". . . formalized the duty which the owner of a wrecked vessel had under the general maritime law to mark the wreck . . ." *Madeleine Wheeldon* v. *U.S.*, 184 F. Supp. 81, 83 (N.D. Cal. 1960).

a wreck owner to end his duty to locate and mark by giving notice to Government Authority; but then approves the Second Circuit's reasoning in its decisions *rejecting* the English rule. The Sixth Circuit accordingly *adopts* the United States rule that the wreckowner's duty is non-delegable,[2] and cannot be avoided by requesting Government action. *Ingram Corp.* v. *Ohio River Co.*, 505 F. 2d 1364, 1371.

1975. The Second Circuit in the present case throws itself into reverse, as well as into conflict with the Sixth Circuit, by holding that ". . . an Owner's duty to mark a wreck ceases once the Coast Guard has undertaken the task"! Majority Opinion, note 6 (10b).

This chronological review of the cases clearly shows:

1. Texaco's assertion that the English law and United States law are the same is false.

The old English rule is directly opposite to the United States rule of *Ingram* and *Berwind*.

Under the English rule of *The Douglas*, mere notice to Government Authority releases the wreckowner from any further duty to locate or mark.

Under the United States rule of *Ingram* and *Berwind*, notice to Government Authority does *not* release the wreckowner from his continuing non-delegable duty to locate and mark.

2. Texaco's assertion that the present rules in the Sixth and Second Circuits are the same is false.

Incredibly, Texaco asserts (Brief, page 25) that there is no conflict between the Sixth Circuit's *Ingram* decision that governmental assumption of responsibility does *not* relieve the wreck owner of his non-delegable duty, and

[2] The wreck owner's duty is the same in United States waters under the Wreck Act, and in international waters under the General Maritime Law. See Note 1, *supra*.

the Second Circuit's decision in the present case that an Owner's duty to mark his wreck *ceases,* once governmental authority has undertaken the task of locating and marking the wreck.

In *Ingram* the Coast Guard: (1) undertook to mark the wreck; (2) issued radio and teletype warnings to mariners about the wreck; and (3) despatched a Coast Guard cutter to the wreck area to mark it. The *Sixth Circuit* in *Ingram* held that this *in no way relieved the wreck owner of his independent and non-delegable duty to mark it properly.*

In the present case (1) the wreck owner had given notice to appropriate governmental authority (Trinity House)[3]; and (2) Trinity House had undertaken to mark the wrecked Texaco Caribbean.

In stark contrast to the Sixth Circuit, the *Second Circuit* held that " . . . *an Owner's duty to mark a wreck ceases once* [*governmental authority*] *has undertaken the task.*" (*emphasis added*).[4]

3. Not English law, but U.S. General Maritime Law, governs Brandenburg Petitioners' claims.

Texaco baldly asserts that the United States General Maritime Law is a "total stranger"[5] to the collision.

The Court below held to the contrary:

> "Liability for a collision on the high seas between vessels flying different flags is determined according to the general maritime law as interpreted by the courts of the forum in which the action proceeds."[6]

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[3] Trinity House is roughly equivalent to the United States Coast Guard.

[4] Majority Opinion, Note 6 (10b).

[5] Texaco Brief in Opposition, p. 19.

[6] Majority Opinion (8b).

Texaco's assertion is also contrary to a consistent string of precedents establishing beyond question that the General Maritime Law, as applied by the Federal United States District Courts, is the *only* law applicable to high seas collision claims tried between vessels of different flags in the United States.

> ". . . if a collision occurs on the high seas, where the law of no particular State has exclusive force, but all are equal, any forum called upon to settle the rights of the parties would *prima facie* determine them by its own law as presumptively expressing the rules of justice; • • • If [the vessels concerned] belong to different nations, having different laws, since it would be unjust to apply the laws of either to the exclusion of the other, *the law of the forum, that is, the Maritime Law as received and practised therein, would properly furnish the rule of decision*". *The Scotland,* 105 U.S. (15 Otto) 24, 29-30 (1881).

The law applicable to a collision

> ". . . on the high seas, not within the jurisdiction of any nation . . ." is ". . . the General Maritime Law, as understood and administered in the courts of the country in which the litigation is prosecuted." *The Belgenland,* 114 U.S. 355, 369 (1885).

In this case the collision took place on the high seas between vessels flying Liberian (Texaco Caribbean) and German (Brandenburg) flags. It is simply not open to question that the high seas collision claims of the Brandenburg and her cargo would be dealt with according to the General Maritime Law as applied in the Federal United States Courts, as and when they may be tried here. No questions of foreign law in any way, shape or form would arise here in dealing with Brandenburg Petitioners' claims.

CONCLUSION

When Texaco's wrong assertions are corrected to accord to the legal authorities, it becomes clear that:

In a United States Court, the law applicable to Brandenburg Petitioners' claims is the General Maritime Law as applied by the United States Federal Court; and

There is at present a conflict between the Second and Sixth Circuits which should be resolved by this Court; and

Under the law of the Sixth Circuit, Brandenburg plaintiffs have a chance to recover their enormous losses resulting from Texaco's failure to mark the wreck of the Texaco Caribbean; while

Under the law of England, Brandenburg plaintiffs have no such chance, since Texaco's duty to locate and mark its wreck ended under English law when Texaco notified Trinity House and Trinity House's accepted the responsibility of locating and marking the wreck.

When Texaco's wrong assertions are thus corrected, and if the conflict between the Second and Sixth Circuits is resolved, as we submit it should be, in favor of the continuing non-delegable duty of the wreck owner to locate and mark, then there is presented a second vital question of federal law for resolution by this Court: can factors of "convenience" *ever* justify remitting a plaintiff to a forum which does *not* give him any effective remedy?

Texaco argues this is merely a "choice of law" question constituting only one of many factors to be considered as to *forum non conveniens.*

Brandenburg Petitioners earnestly urge that an effective alternative forum preserving a plaintiff's remedy is a ***condition precedent*** to application of ***forum non conveniens.*** We respectfully submit that this is the fair inference from this Court's statement in *Gulf Oil* v. *Gilbert,* 330 U.S. 501,

508 (1947), that ". . . plaintiff may not, by choice of an inconvenient forum, 'vex', 'harass' or 'oppress' the defendant by inflicting upon him expense or trouble *not necessary to his own right to pursue his remedy." (emphasis added)* This vital issue of federal law has however not yet been squarely decided by this Court.

We respectfully request it be so decided now, after resolution of the conflict between the Sixth and Second Circuits. Resolution of that conflict is we submit of great practical importance, since it involves the question of whether a wreck owner has a continuing duty to protect the lives and property of navigators, or can end his duty by a mere notice to public authority.

And as justice is the central requirement of *forum non conveniens,* we submit that it is also a highly important question whether it is not a condition precedent that there be *an effective remedy* in the proposed alternate forum.

We respectfully request that *certiorari* be granted.

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Respectfully submitted,

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